No. 14-103

Supreme Court, U.S.
FILED
AUG 2 9 2014
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,

Petitioners,

v.

ASARCO LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE BUSINESS LAW SECTION OF THE FLORIDA BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

THOMAS R. MCCARTHY
Counsel of Record
SAMUEL B. GEDGE
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000
tmccarthy@wileyrein.com

Counsel for Amicus Curiae

August 29, 2014

255216

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF CONTENTS..... i

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT... 2

ARGUMENT..... 5

I. The Fifth Circuit Misinterpreted the Relevant Statute and Misapprehended Sister-Circuit Precedent 5

A. Text and history show that Congress did not intend to categorically exclude compensation for fee litigation.....5

B. The Fifth Circuit's reliance on Eleventh Circuit precedent misinterpreted that authority and misunderstood its impact on bankruptcy practice in the Eleventh Circuit . ..... .10

II. Establishing Uniformity on this Issue Is Critically Important to the Day-to-Day Practice of Bankruptcy Lawyers 14

Table of Contents

Page

A. Reducing Section 330 fees through uncompensated fee litigation will tend to dilute the quality of the bankruptcy bar, inflate rates charged for bankruptcy work, or both. 14

B. Unless resolved, the Fifth Circuit's break with the majority view will invite satellite fee litigation in the other major bankruptcy jurisdictions 17

C. The U.S. Trustee Program's guidelines underscore the courts' division on compensation for fee defense and the need for review by this Court. 18

CONCLUSION 21

TABLE OF CITED AUTHORITIES

Page

CASES

Bd. of Cnty. Comm'rs v. Umbehr,
518 U.S. 668 (1996) 17

Bonner v. City of Prichard,
661 F.2d 1206 (11th Cir. 1981)(en banc) .... .11

Boyd v. Engman,
404 B.R. 467 (W.D. Mich. 2009) 7, 18

Grant v. George Schumann Tire & Battery Co.,
908 F.2d 874 (11th Cir. 1990). 3, 10, 11

In re Busy Beaver Bldg. Ctrs., Inc.,
19 F.3d 833 (3d Cir. 1994) 7

In re Cahill,
428 F.3d 536 (5th Cir. 2005) 7

In re Catalina Spa & R.V. Resort, Ltd.,
97 B.R. 13 (Bankr. S.D. Cal. 1989)..... .13

In re Claudio,
459 B.R. 500 (Bankr. D. Mass. 2011).. .6-7

In re Concrete Prods., Inc.,
No. 88-20540, 1993 WL 13726054
(Bankr. S.D. Ga. July 27, 1993)..... 13

Cited Authorities

Page

In re First Colonial Corp. of Am.,
544 F.2d 1291 (5th Cir. 1977) 7

In re Hambrick,
No. 08-66265, 2012 WL 10739279
(Bankr. N.D. Ga. Apr. 10, 2012) 12

In re Jankowski,
382 B.R. 533 (Bankr. M.D. Fla. 2007). 12

In re Key Airlines,
No. 93-40226, 1994 WL 16005203
(Bankr. S.D. Ga. Mar. 21 1994). 12

In re McClanahan,
137 B.R. 73 (Bankr. M.D. Fla. 1992) 13

In re Motors Liquidation,
No. 09-50026 (Bankr. S.D.N.Y. Nov. 23, 2010) 12, 20

In re Smith,
317 F.3d 918 (9th Cir. 2002)..... 20

In re The New Power Co.,
Nos. 02-10835, 02-10836, 02-10837, 2007 WL
7143077 (Bankr. N.D. Ga. June 25, 2007) 13

Lamie v. U.S. Trustee,
540 U.S. 526 (2004)... ....2, 5, 14

Cited Authorities

Page

Matter of Bilgutay,
108 B.R. 333 (Bankr. M.D. Fla. 1989) 13

Rose Pass Mines, Inc. v. Howard,
615 F.2d 1088 (5th Cir. 1980).. ..... .11

STATUTES & OTHER AUTHORITIES

U.S. Const. art. I, § 8, cl. 4 20

11 U.S.C. § 330..... ..... *passim*

11 U.S.C. § 330(a)(1)..... ..... *passim*

11 U.S.C. § 330(a)(1)(A)..... 5

11 U.S.C. § 330(a)(3)(A)-(B) 5

11 U.S.C. § 330(a)(3)(C). 2, 5, 6, 8

11 U.S.C. § 330(a)(3)(F).... ..... .15

11 U.S.C. § 330(a)(4)(A)..... 5

11 U.S.C. § 330(a)(6) 8

28 U.S.C. § 586(a)(3) 18

28 U.S.C. § 586(a)(3)(A)..... 19

Cited Authorities

Page

78 Fed. Reg. 36250 (June 17, 2013) 19, 20

78 Fed. Reg. 36275 (June 17, 2013) 19

Am. Bankr. Inst., American Bankruptcy Institute National Report on Professional Compensation in Bankruptcy Cases (G.R. Warner rep. 1991)..... ....6, 7, 17, 18

Brenda Hacker Osborne, Note, *Attorneys' Fees in Chapter 11 Reorganizations: A Case for Modified Procedures*, 69 Ind. L.J. 581 (1994).....18

Comm. on the Judiciary, Bankruptcy Judgeship Authorization and a General Overview of the Bankruptcy Code (May 16, 1991). .... .16

Comm. on the Judiciary, Hearing on Professional Fees in Bankruptcy (Mar. 24, 1992)..... ....6, 16, 18

Deborah D. Williamson & Lynnelle Loke, *Compensation for Time Spent Preparing and Prosecuting Fee Applications*, 1991 Ann. Surv. of Bankr. Law 15 7

George W. Kuney, *Hijacking Chapter 11*, 21 Emory Bankr. Dev. J. 19 (2004)... .....3, 15

Cited Authorities

Page

H.R. Rep. 95-595, 95th Cong, 1st Sess. (1977) 2, 14, 15, 16

Martin J. Bienenstock *et al.*, *Response to "Routine Illegality in Bankruptcy Court, Big-Case Fee Practices"*, 83 Am. Bankr. L.J. 549 (2009) ..... .15

Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. Rev. 384 (2012)... .17

S. Rep. No. 102-279, 102d Cong., 2d Sess. (1992).....14

S. Rep. No. 103-168, 103d Cong., 1st Sess. (1993) 9

Stephen J. Lubben, *The Clash Over Bankruptcy Fees*, N.Y. Times (Feb. 4, 2011) 19

Teresa A. Sullivan *et al.*, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 Harv. J.L. & Pub. Pol'y 801 (1994) ... .14

Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan. L. Rev. 747 (2010) 4, 17

INTEREST OF *AMICUS CURIAE*[1]

The Business Law Section of the Florida Bar is a voluntary organization within the Florida Bar for members interested in corporate law, banking, business, bankruptcy, computer and cyber law, antitrust and franchise law, litigation, and related areas of law. Its purpose is to provide a forum for the discussion and exchange of ideas leading to the improvement of the laws relating to these areas. The Business Law Section has filed *amicus* briefs with the United States Supreme Court, the United States Courts of Appeals, and the Florida Supreme Court in cases involving bankruptcy-related issues. The Business Law Section also actively participates in legislative initiatives contemplating amendments to the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and applicable Florida statutes. *Amicus* thus has a strong interest in the proper interpretation and administration of the Bankruptcy Code.[2]

---

1. Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* states that no counsel for a party authored this brief in whole or in part, and no party or counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus*, its members, or its counsel, made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, *Amicus* states that Petitioners and Respondent, upon timely receipt of notice of *Amicus*'s intent to file this brief, have consented to its filing.

2. This brief was reviewed by the Executive Committee of the Board of Governors of The Florida Bar on August 26, 2014, consistent with applicable standing board policies. It is tendered solely by the Business Law Section and supported by the separate resources of this voluntary organization—not in the name of The Florida Bar, and without implicating the mandatory membership fees paid by any Florida Bar licensee.

SUMMARY OF ARGUMENT

1. "For over 100 years debtors' attorneys have been considered by Congress and the courts to be an integral part of the bankruptcy process." *Lamie v. U.S. Trustee*, 540 U.S. 526, 529 (2004). To "enable the system to operate smoothly, efficiently, and expeditiously," H. Rep. No. 95-595, 95th Cong, 1st Sess, 330 (1977), Congress has empowered the courts to award professional fees under the Bankruptcy Code. Section 330(a)(1) vests broad discretion in the courts to provide "reasonable compensation" for services that are "actual" and "necessary." 11 U.S.C. § 330(a)(1).

On the strength of Section 330, most courts to consider the issue have held that professionals can receive compensation in connection with defending their fee applications. Fee litigation is a recurring part of the bankruptcy process, and resolving professionals' claims is, quite literally, "necessary to the administration of, or beneficial ... toward the completion of, a case under" Title 11. *Id.* § 330(a)(3)(C). Without resolving outstanding professional-fee issues, a bankruptcy case cannot be closed.

The Fifth Circuit largely agreed with these general principles, acknowledging that fee-related proceedings are "[i]mplicit" in bankruptcy cases. Pet. App. 15a. Yet it nonetheless held that courts can *never* award professional fees in connection with these proceedings. In other words, despite having acknowledged that the resolution of fee disputes is required to close a bankruptcy case, the court below held that defending fee applications are, as a matter of law, never "necessary to the administration of,

or beneficial ... toward the completion of" that case. 11 U.S.C. § 330(a)(1).

In reaching this atextual result, the Fifth Circuit misinterpreted both Section 330 and the key sister-Circuit precedent on which it relied. In particular, the court drew inspiration from an Eleventh Circuit decision, *Grant v. George Schumann Tire & Battery Co.*, 908 F.2d 874 (11th Cir. 1990), which, in the Fifth Circuit's view, held that fee-related services are never covered by Section 330. In truth, though, *Grant* actually upheld the lower courts' discretion in awarding fees. And notwithstanding dicta in that decision, bankruptcy courts in the Eleventh Circuit regularly award compensation in connection with fee defense.

Thus, the Fifth Circuit's decision breaks new ground at the appellate level. The court openly parted ways with the Ninth Circuit and established itself on the minority side of a split that has been developing in the trial courts for more than two decades. Indeed, guidelines issued by the U.S. Trustee Program suggest that the Executive Branch, too, is struggling with this division in authority. Despite a statutory charge to apply its fee guidelines "uniformly," the U.S. Trustee Program has announced two divergent views on Petitioners' question presented and has ultimately settled on considering the compensability of fee-related services on a patchwork, district-by-district basis.

2. The practical consequences of this split are profound. Congress's point in enacting and amending Section 330 was to "attract high caliber professionals to handle bankruptcy cases." George W. Kuney, *Hijacking Chapter 11*, 21 Emory Bankr. Dev. J. 19, 42 (2004).

Congress recognized that a system that undercompensates its best professionals will quickly lose them. Yet the Fifth Circuit's decision—and others like it—directly undercut Congress's purpose. By categorically barring its lower courts from awarding fees in connection with fee litigation, the Fifth Circuit's decision ensures that whatever fees are awarded will be diluted by the hours of uncompensated time spent defending them.

As the only Circuit-court decision on the minority side of the split, moreover, the Fifth Circuit's ruling invites fee-objectors to revisit this issue in the ten Circuits whose courts of appeals have not yet addressed the matter. Respondent sees this uptick in satellite fee litigation as an asset, claiming that the issue will benefit from "more percolation ... in the circuit courts." BIO 14. But it is highly unlikely that this question will reach many future appellate courts (as the past two decades show). "Factors unique to bankruptcy litigation limit the ability of disputes to make their way to the courts of appeals." Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan. L. Rev. 747, 787 (2010). A more likely outcome is that fee-objectors will exploit the Fifth Circuit's decision as a tactical measure, either to browbeat counsel into accepting lower fees or even to influence the litigation decisions of debtors' estates more broadly. This Court should grant certiorari both to correct the Fifth Circuit's interpretation of Section 330 and to put to rest the lower courts' well-developed split in authority.

ARGUMENT

I. The Fifth Circuit Misinterpreted the Relevant Statute and Misapprehended Sister-Circuit Precedent.

A. Text and history show that Congress did not intend to categorically exclude compensation for fee litigation.

Section 330(a)(1) authorizes the courts to award professional fees under the Bankruptcy Code, "including fees for services rendered by attorneys in connection with bankruptcy proceedings." *Lamie v. U.S. Trustee*, 540 U.S. 526, 529 (2004). The law vests broad discretion in the courts, empowering them to provide "reasonable compensation" for services that are "actual" and "necessary." 11 U.S.C. § 330(a)(1)(A).

This grant of power is tailored by other provisions. For example, the court must consider "all relevant factors," and Section 330(a)(3) prescribes six considerations that the court must take into account. Some are commonsense—"the time spent on ... services," for instance, and "the rates charged for such services." *Id.* § 330(a)(3)(A)-(B). Others tether the award to services that were actually performed in connection with the proceeding; in particular, the Code instructs an awarding court to consider "whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title." *Id.* § 330(a)(3)(C); *see also id.* § 330(a)(4)(A) (disallowing fees for services not reasonably likely to benefit the debtor's estate and not "necessary to the administration of the

case"). At base, the courts must take care that the fees awarded are fair—both to the estate and to counsel—and that they have a nexus with the proceeding itself.

Fees incurred in litigating fee applications fit comfortably within Section 330(a)'s zone of discretion—as most courts to have considered the issue have held. *See* Pet. App. 167a-171a. Even before the Bankruptcy Reform Act of 1994, the American Bankruptcy Institute remarked that, "[i]n many jurisdictions, professionals are compensated from estate assets for their efforts in presenting and defending fee applications." Comm. on the Judiciary, Hearing on Professional Fees in Bankruptcy (Mar. 24, 1992) (selected excerpts from Am. Bankr. Inst., American Bankruptcy Institute National Report on Professional Compensation in Bankruptcy Cases (G.R. Warner rep. 1991) (hereinafter "Warner")); *see also* Warner, *supra*, at 196 ("A majority of the more recently reported decisions tend to allow compensation for the preparation and presentation of fee applications.").

This makes good sense. Bankruptcy cases cannot be closed until the claims of all third parties—including trustees, examiners, attorneys, accountants, and others—have been resolved. Litigating fee applications is, in quite a literal sense, "necessary to the administration of, or beneficial ... toward the completion of, a case" under Title 11. 11 U.S.C. § 330(a)(3)(C). It is an integral part of bankruptcy proceedings. Section 330 provides for notice to the parties in interest and the U.S. Trustee and the opportunity for a hearing on any fee application. *Id.* And the courts themselves "ha[ve] an independent judicial responsibility to review the fees of professionals, even in the absence of an objection by a party in interest." *In*

re Claudio, 459 B.R. 500, 512 (Bankr. D. Mass. 2011). The Fifth Circuit, in fact, has embraced one of the most involved fee-application processes in the nation, ruling that each bankruptcy judge has a "duty to hold ... [an evidentiary] hearing on his own motion" whenever a fee application does not "adequately develop the factual basis for the awards." *In re First Colonial Corp. of Am.*, 544 F.2d 1291, 1300 (5th Cir. 1977), *superseded by statute on other grounds*; *see also In re Cahill*, 428 F.3d 536, 540 n.6 (5th Cir. 2005). In short, "[p]reparing and defending attorney fee applications is part and parcel with the attorney's role in the administration of the bankruptcy process." *Boyd v. Engman*, 404 B.R. 467, 483 (W.D. Mich. 2009).

In reaching the opposite conclusion, the Fifth Circuit threw in its lot with the minority side of a split that has been maturing since even before the 1994 amendments to the Bankruptcy Code. *See, e.g., In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 843 (3d Cir. 1994) (remarking on the "split of authority regarding whether time spent pursuing fees is compensable"); Deborah D. Williamson & Lynnelle Loke, *Compensation for Time Spent Preparing and Prosecuting Fee Applications*, 1991 Ann. Surv. of Bankr. Law 15 (itemizing split in 1991); *see also* Warner, *supra*, at 194 (noting, in 1991, that "the bankruptcy courts remain split"). The Fifth Circuit accepted that litigating fee disputes is a necessary part of the administration of bankruptcy cases. Pet. App. 15a. Yet at the same time, the court maintained that professional fees incurred in that litigation are categorically out of bounds under Section 330(a)(1). Put another way, the court singled out fees for proceedings that are an "[i]mplicit" part of a bankruptcy case (Pet. App. 15a) and held that they can *never* be "necessary to the administration of, or beneficial

... toward the completion of" that case. 11 U.S.C. § 330(a)(3)(C); Pet App. 14a.

To reach this atextual result, the Fifth Circuit relied on Section 330(a)(6), a provision that is meant not to confer the authority to award fees but to guide the exercise of that authority. Section 330(a)(6) devises a unique limit on the courts' otherwise ample discretion, identifying "compensation awarded for the preparation of a fee application" for special treatment. Unlike other fees awarded under Section 330—which are keyed to the fees charged by comparable non-bankruptcy practitioners—compensation for preparing fee applications "shall be based on the level and skill reasonably required to prepare the application." 11 U.S.C. § 330(a)(6).

As interpreted by the Fifth Circuit, this provision withdrew the courts' discretion to award compensation for any other services related to fee applications. Because Section 330(a)(6) mentions only preparing fee applications, the court noted, it does not "encompass satellite litigation over [those] ... application[s]." Pet. App. 16a. Reasonably read, the narrowness of Section 330(a)(6) means that the courts have discretion to compensate for other fee-related services as they would any other "actual" and "necessary" service. But the Fifth Circuit saw it differently. In the court's view, Section 330(a)(6) marks the metes and bounds of compensation for all fee-related services. As a result, Congress's failure to single out any other fee-related services in Section 330(a)(6) meant that those services are categorically outside the zone of compensation in Section 330(a)(1).

This reading conflicts with both text and history. As Petitioners have explained, "§330(a)(6) is not a textual grant, much less an implicit denial, of authority." Pet. 29. Instead, it cabins the courts' discretion in awarding fees for a subset of services that are otherwise compensable under Section 330(a)(1). When determining fees for all other "necessary, actual services," the courts must consider the rates of comparably skilled non-bankruptcy counsel. But for the "clearly different" (Pet. App. 15a), ministerial act of preparing a fee application, the courts must base compensation on the "level and skill" involved. In Petitioners' words, Section 330(a)(6) simply "provides a metric" for calculating fees for a particular type of service that the courts are empowered to compensate. Pet. 29. The provision does not define the bounds of the courts' discretion; it simply addresses the mechanics of exercising that discretion for a particular type of service.

The legislative history only confirms Petitioners' interpretation. The original proposed draft of Section 330(a)(6) leaves no doubt that the provision serves to direct "the court[s] [to] recognize the difference between the cost of professional services and services for the preparation of fee applications" when "determining the amount to be awarded for the preparation of fee applications." S. Rep. No. 103-168, 103d Cong., 1st Sess., 27 (1993). In other words, as Petitioners have argued, the provision "does not determine whether, but *how much*, to compensate for preparation." Pet. 29. Nor does it abridge the other types of services—including fee-related services—that the lower courts have discretion to compensate under Section 330(a).

B. The Fifth Circuit's reliance on Eleventh Circuit precedent misinterpreted that authority and misunderstood its impact on bankruptcy practice in the Eleventh Circuit.

In declaring a categorical bar on fee-related compensation, the Fifth Circuit leaned on the Eleventh Circuit opinion in *Grant v. George Schumann Tire & Battery Co.*, 908 F.2d 874 (11th Cir. 1990). According to the Fifth Circuit, *Grant* blazed the trail by holding that services relating to professional fees can never be covered by Section 330. Pet. App. 15a. In truth, *Grant* says nothing of the sort, and it provides little guidance on the question whether fees can be awarded when a professional is successful in defending a fee application.

In *Grant*, debtor's counsel sought final fees in the amount of $138,400.00, but the bankruptcy court awarded only $35,725.88 after finding that counsel spent more time on the case than was necessary. *Id.* at 877. The debtor appealed even though the award was actually in its favor, and counsel filed a cross-appeal. The district court vacated the fee award and remanded for a *de novo* determination that included an explanation for the award. *Id.* A second bankruptcy judge considered the matter on remand and awarded the same reduced fee of $35,725.88. *Id.* Counsel appealed again, and the district court affirmed the fee award after conducting a *de novo* review. *Id.*

The Eleventh Circuit affirmed the district court's ruling, finding that counsel took unnecessary and self-serving actions in the case that resulted in a misadministration of the bankruptcy estate. *Id.* at 885. For those same reasons, the Eleventh Circuit denied counsel's

request for an award of fees incurred in prosecuting the appeal. *Id.* at 882 n.19.

In reaching its decision, the court in *Grant* noted that the award of $35,725.88 actually included $4,000.00 that could be attributed to fees incurred in the first appeal and remand. *Id.* at 882. In addition, *Grant* affirmed the bankruptcy court's fee award; it upheld the lower court's broad discretion to award compensation—or not—for professional services related to the bankruptcy proceeding. *See id.* (affirming bankruptcy court's judgment that counsel "was not entitled to remuneration under section 330 for defending the appeal."). To be sure, the Eleventh Circuit's opinion has its share of dicta. *See id.* at 883 ("If [the bankruptcy court] erred in calculating [counsel's] fee, it erred by 'paying' him for services rendered to himself and not to the estate."). But unlike the Fifth Circuit here, *Grant*'s holding affirmed the lower court's exercise of discretion rather than vetoing it. Indeed, a decision barring compensation for all fee-related work would have broken with both Fifth and Eleventh Circuit precedent; the pre-1981 Fifth Circuit stressed that "[i]t would be unduly penurious to require [preparation of a fee application] without granting reasonable compensation." *Rose Pass Mines, Inc. v. Howard*, 615 F.2d 1088, 1093 (5th Cir. 1980).[3]

In practice, moreover, not even the courts in the Eleventh Circuit read *Grant* as an across-the-board

3. The Eleventh Circuit has adopted as binding precedent all decisions of the former Fifth Circuit issued before October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

bar on compensation for fee litigation. Members of the Florida State Bar find that courts routinely award compensation for defending fee applications. Often, these awards appear in unpublished orders that do not parse out the professional services being compensated.[4] But a fair number of Eleventh Circuit bankruptcy courts have memorialized this position in written opinions. Even before the Bankruptcy Reform Act of 1994, at least one court in the Circuit viewed it as "well-settled ... in this Court that time devoted by counsel to the prosecution of a fee application in a bankruptcy proceeding, if otherwise reasonable, is compensable." *In re Key Airlines*, No. 93-40226, 1994 WL 16005203, at *3 (Bankr. S.D. Ga. Mar. 21 1994). More recently, another court in the Circuit noted that "preparing, presenting and defending the fee application of a law firm representing the trustee is no different than preparing any other legal document or pleading in a contested matter or adversary proceeding." *In re Hambrick*, No. 08-66265, 2012 WL 10739279, at *7 (Bankr. N.D. Ga. Apr. 10, 2012).

Nor are those two decisions outliers. *See, e.g.*, *In re Jankowski*, 382 B.R. 533, 546 (Bankr. M.D. Fla. 2007) (approving fees when trustee's counsel "was compelled to respond to the objections and to prepare for the hearing that was scheduled on the fee applications" and "recogniz[ing] the importance of compensating trustees and their counsel for work performed in difficult Chapter

4. This practice is not unique to the Eleventh Circuit; bankruptcy courts nationwide regularly dispose of fee-related issues via unpublished orders. *See, e.g.*, Bench Decision, *In re Motors Liquidation*, No. 09-50026, at 2 (Bankr. S.D.N.Y. Nov. 23, 2010) ("authoriz[ing] payment of the costs of defending against [an] objection if the fee applicant substantially prevails").

7 cases, so that competent professionals are encouraged to accept the employment"); *In re The New Power Co.*, Nos. 02-10835, 02-10836, 02-10837, 2007 WL 7143077, at *9 (Bankr. N.D. Ga. June 25, 2007) ("Services rendered in preparing and defending the fee application are compensable to the extent that the Court has found that the underlying services resulted in a substantial contribution.");[5] *In re Concrete Prods., Inc.*, No. 88-20540, 1993 WL 13726054, at *3 (Bankr. S.D. Ga. July 27, 1993) (approving fees when counsel "was required to prepare for and attend three different hearings on [his] application where he made arguments, presented evidence and called witnesses to counter the objections to his application and motion by the debtor"); *Matter of Bilgutay*, 108 B.R. 333, 339 (Bankr. M.D. Fla. 1989) (noting that "other bankruptcy courts have found fees and costs of defending a fee application not compensable" but nonetheless approving costs associated with defending fee application). *But see In re McClanahan*, 137 B.R. 73, 76 (Bankr. M.D. Fla. 1992) (citing *Grant* for the proposition that "compensation for time spent defending a fee application on appeal has been disallowed"). Far from treading a well-worn path, then, the Fifth Circuit's decision broke with the practice of the courts in the Eleventh Circuit. It also split with the Ninth Circuit, Pet. App. 16a, and establishes an uncompromising bar on fee-related compensation that is unlike any other Circuit precedent in the nation.

---

5. *In re The New Power Co.* involved a fee application under 11 U.S.C. § 503(b), not Section 330. But "[a]s an attorney seeking fees under § 503(b) must apply to the court in the same manner as an attorney under § 330," courts have viewed the provisions similarly "for purposes of compensation for fee applications. " *In re Catalina Spa & R.V. Resort, Ltd.*, 97 B.R. 13, 21 (Bankr. S.D. Cal. 1989), *cited in In re The New Power Co.*, 97 B.R. at 9 n.2.

II. Establishing Uniformity on this Issue Is Critically Important to the Day-to-Day Practice of Bankruptcy Lawyers.

A. Reducing Section 330 fees through uncompensated fee litigation will tend to dilute the quality of the bankruptcy bar, inflate rates charged for bankruptcy work, or both.

"For over 100 years debtors' attorneys have been considered by Congress and the courts to be an integral part of the bankruptcy process." *Lamie*, 540 U.S. at 539. Because "[t]he bankruptcy system is complex and difficult to maneuver within," Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 Harv. J.L. & Pub. Pol'y 801, 863 (1994), specialized attorneys are critical to the effective, efficient processing of bankruptcy cases.

Congress has long appreciated this unique need for skilled counsel. As early as 1977, Congress recognized that "[b]ankruptcy specialists" play an indispensable role in "enabl[ing] the system to operate smoothly, efficiently, and expeditiously." H. Rep. No. 95-595, 95th Cong, 1st Sess., 330 (1977). These sentiments also surfaced in the lead-up to the 1994 amendments, which made "comprehensive changes" to "[t]he subject of professional fees." *Lamie*, 540 U.S. at 529. In the words of Senator DeConcini, "anyone who has read the code understands how complicated an area of law it is," so "[b]ankruptcy professional[s], with a strong knowledge of the law" are among the key actors in keeping the process working. *See* S. Rep. No. 102-279, 102d Cong., 2d Sess., 54 (1992).

Section 330 is designed to promote this system by "attract[ing] high caliber professionals to handle bankruptcy cases." George W. Kuney, *Hijacking Chapter 11*, 21 Emory Bankr. Dev. J. 19, 42 (2004). To that end, the Bankruptcy Reform Act of 1994 ensured that professional fees would be measured against "the customary compensation charged by comparably skilled practitioners in [non-bankruptcy] cases." 11 U.S.C. § 330(a)(3)(F). "[T]he mandate of 11 U.S.C. § 330(a) ... is an effort to ensure that bankruptcy specialists ... will not be required to accept fees in all of their cases that are consistently lower than fees they could receive elsewhere, thereby forcing them to forego the practice of bankruptcy law." Kuney, *supra*, at 42 (citation omitted). At base, vesting power in the bankruptcy courts to award professional fees follows from the premise that "[p]rofessionals render services that can add value and that can not be viewed only as an expense." Martin J. Bienenstock et al., *Response to "Routine Illegality in Bankruptcy Court, Big-Case Fee Practices"*, 83 Am. Bankr. L.J. 549, 571 (2009).

Diluting professional fees by rendering fee litigation uncompensable thus undercuts the very purpose of Section 330. Left unchecked, this sort of fee-dilution will invite the very problems Congress intended to curtail. "[I]f required to accept fees in all of their cases that are consistently lower than fees they could receive elsewhere," bankruptcy specialists "will not remain in the bankruptcy field." H.R. 95-595, 95th Cong., 1st Sess., 329-30 (1977). Alternatively, the bankruptcy system will start seeing rates rise across the board, as firms offset the risk of expensive fee litigation by passing on the costs to debtor estates. Pet. App. 18a n.7. Not only that, in all likelihood the hardest-hit firms will be the smaller ones, whose bread-and-butter work is modest

bankruptcy proceedings. The Fifth Circuit attached little importance to Baker Botts's $5 million loss, amounting as it did to "only about 4.4% of the entire fee." Pet. App. 19a. But for smaller, bankruptcy-specific firms, reductions are likely to be a much larger percentage of total revenue. Pet. 24. And by the same token, these smaller firms are much less able to absorb recurring losses. *Cf.* H.R. Rep. 95-595, 95th Cong, 1st Sess., 329-30 (1977) (suggesting that a "low fee in a small segment of a practice can be absorbed by other work").

The Fifth Circuit dismissed these ill-effects out of hand, viewing fee litigation as a normal cost of doing business. Pet. App. 17a. However, this position ignores the fact that "[b]ankruptcy professionals operate in an environment virtually unheard of in the legal profession as a whole." Comm. on the Judiciary, Hearing on Professional Fees in Bankruptcy (Mar. 24, 1992) (Testimony of I.W. Cohen). Their fees are "closely scrutinized by the Bankruptcy Court, the U.S. Trustee and other parties in interest," *id.*, and often a portion of the requested fees is held back until the conclusion of the bankruptcy case. For this reason, "many capable professionals decline to participate in bankruptcy cases because of the cumbersome, time consuming and expensive requirements of the fee review process which do not exist when dealing with private clients." Comm. on the Judiciary, Bankruptcy Judgeship Authorization and a General Overview of the Bankruptcy Code (May 16, 1991) (Testimony of R.E. Phelan). It is these precise challenges to bankruptcy practitioners that earned Congress's solicitude for professionals in the bankruptcy system.

B. Unless resolved, the Fifth Circuit's break with the majority view will invite satellite fee litigation in the other major bankruptcy jurisdictions.

As the only Circuit-court decision on the minority side of this issue, the Fifth Circuit's ruling creates uncertainty that will ultimately result in further litigation. "Uncertainty breeds litigation," *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 698 (1996) (Scalia, J., dissenting), and doubts about Section 330 will attract satellite fee disputes in the Circuits whose courts of appeals have yet to address this issue. Respondent casts this in a positive light, claiming that the question would benefit from "more percolation ... in the circuit courts." BIO 14. But after more than two decades of uncertainty, *see supra* 7, this Court's review is warranted to finally resolve the question presented. Even before the 1994 amendments to the Bankruptcy Code, commentators labeled professional-fee awards one of the most "publicly controversial" and least "consistently administered" areas in all of bankruptcy law. Warner, *supra*, at 1. That remains true today, and the level of appellate-court involvement is not a reliable barometer of the issue's recurring importance in day-to-day bankruptcy practice. *See* Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan. L. Rev. 747, 787 (2010) ("Factors unique to bankruptcy litigation limit the ability of disputes to make their way to the courts of appeals."); *see also* Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. Rev. 384, 438-39 (2012).

Professional-fee issues are distinctive, moreover, in their potential for abuse. Fee objections have been called a "wonderful tactical measure," and with good reason. Brenda Hacker Osborne, Note, *Attorneys' Fees in Chapter 11 Reorganizations: A Case for Modified Procedures*, 69 Ind. L.J. 581, 592 (1994). The threat of extended fee litigation can strong-arm counsel into accepting lower compensation, *Boyd*, 404 B.R. at 483, or even bring pressure to bear on the litigation decisions of debtors' estates, *see* Comm. on the Judiciary, Hearing on Professional Fees in Bankruptcy (Mar. 24, 1992) (Testimony of K. Shapiro). Unless corrected, the current state of affairs has the potential to impair both the vitality of the bankruptcy bar and the soundness of our bankruptcy system more broadly.

C. The U.S. Trustee Program's guidelines underscore the courts' division on compensation for fee defense and the need for review by this Court.

The courts' disarray over compensation for fee litigation is actually memorialized in the Federal Register, in the U.S. Trustee Program's fee guidelines. The U.S. Trustee Program is an agency of the Department of Justice, charged with "supervis[ing] the administration of cases and trustees in cases under chapter 7, 11, 12, 13 or 15 of title 11 ... ." 28 U.S.C. § 586(a)(3). Its role in bankruptcy proceedings is considerable, especially when it comes to fee applications. In the run-up to the 1994 amendments, for example, the American Bankruptcy Institute remarked that the U.S. Trustee Program "tak[es] a very active role in the professional compensation arena." Warner, *supra*, at 63. That reputation persists; in 2011, for example,

bankruptcy scholar Stephen J. Lubben remarked on the U.S. Trustee Program's "long history" of "sweat[ing] the small stuff" in major Chapter 11 cases. Stephen J. Lubben, *The Clash Over Bankruptcy Fees*, N.Y. Times (Feb. 4, 2011).

Among each U.S. Trustee's duties is "reviewing, in accordance with procedural guidelines adopted by the Executive Office of the United States Trustee ... , applications filed for compensation and reimbursement under section 330 of title 11." 28 U.S.C. § 586(a)(3)(A). The purpose of this mandate is to harmonize fee awards nationwide; Congress explicitly charged the U.S. Trustees with applying the guidelines "uniformly" unless particular "circumstances warrant different treatment." *Id.*

When it comes to compensation for fee defense, though, the U.S. Trustee Program has recognized that uniformity does not exist. In its recent *Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under United States Code by Attorneys in Larger Chapter 11 Cases*, the U.S. Trustee Program acknowledged that the idiosyncrasies of each judicial district will dictate how U.S. Trustees apply the *Guidelines*. *See* 78 Fed. Reg. 36250 (June 17, 2013). Although the *Guidelines* at one point appear to frown on compensation for fee litigation as "generally inappropriate," *id.* 36250, the U.S. Trustee Program nonetheless announced in the comments to the *Guidelines* that it "follows the bankruptcy court's decision in *In re Motors Liquidation Co.*," *id.* 36275—a decision that joined the majority of courts in "authoriz[ing] payment of the costs of defending against [an] objection if the fee applicant substantially prevails." Bench Decision, No. 09-

50026, at 2 (Bankr. S.D.N.Y. Nov. 23, 2010). Ultimately, the U.S. Trustee Program advises that it may object to compensation for fee-related work "unless those activities fall within a judicial exception applicable within the district (such as litigating an objection to the application where the applicant substantially prevails)." 78 Fed. Reg. 36250.

The *Guidelines* thus highlight the confusion that has followed from Petitioners' question presented. In the District of Montana, for example, the U.S. Trustee is unlikely to object when a professional seeks compensation for defending fee applications. *In re Smith*, 317 F.3d 918 (9th Cir. 2002). In Mississippi districts, however, objections may be common. Pet. App. 1a-21a. And in districts like the Southern District of New York and the Eastern District of Michigan—home to intra-district conflicts—the U.S. Trustee's position is currently unknown. *See* Pet. App. 167a-171a. These are not the "uniform Laws on the subject of Bankruptcies" contemplated by the Constitution. U.S. Const. art. I, § 8, cl. 4. The U.S. Trustee Program's *Guidelines* thus only underscore the need for this Court's review.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

THOMAS R. MCCARTHY
Counsel of Record
SAMUEL B. GEDGE
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000
tmccarthy@wileyrein.com

Counsel for Amicus Curiae

August 29, 2014